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Supreme Court of the United States

OCTOBER TERM, 1955

No. 227

UNITED MINE WORKERS OF AMERICA, Et Al., *Petitioners*

v.

ARKANSAS OAK FLOORING COMPANY, *Respondent*

On Writ of Certiorari to the Supreme Court of the State of Louisiana

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana, (R. 69), was rendered on April 25, 1955, and is reported in 81 So(2d) 413. Rehearing was refused on May 31, 1955. (R. 101)

JURISDICTION

The petition for certiorari was filed on July 12, 1955, under Title 28, United States Code, Section 1257 (3). Certiorari was granted on October 17, 1955. (R. 101)

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QUESTIONS PRESENTED FOR REVIEW

1. Do Sections 1, 7, 8 (a) (5) and 13 of the Labor Management Relations Act protect the rights of employees engaged in interstate commerce to designate as representative of their own choosing for the purposes of collective bargaining, a labor union which has not complied with Section 9 (f) (g) and (h) of the Act?

2. (a) Is picketing to obtain recognition of a majority designated union representative, which has not complied with Section 9 (f) (g) and (h) of the Labor Management Relations Act, picketing for an unlawful purpose which may be enjoined for that reason by a State Court?

(b) Is it not picketing protected by Amendments I and XIV of the United States Constitution and Sections 1, 7, 8 (a) (5) and 13 of the Labor Management Relations Act?

3. Where an employer engaged in interstate commerce files in a State Court a petition for an injunction against some of his employees and a labor union, which petition alleges:

> "Petitioner shows that the picketing presently engaged in by the defendant union has for its unlawful purpose the forcing of petitioner to interfere with the rights of its employees, as expressed by the legislature of Louisiana, by requiring petitioner to deal with the defendant union as a representative of its employees in the absence of their selection of said union as their representative." (R. 4)

does it not charge an unfair labor practice under Section 8 (a) (3) and Section 8 (b) (2) of the Labor Management Relations Act and thereby preclude State jurisdiction?

STATEMENT OF THE CASE

The respondent, Arkansas Oak Flooring Company, a Delaware Corporation (R. 24), operating an oak flooring manufacturing plant in Alexandria, Louisiana, filed an injunction suit on March 2, 1954 (R. 3) in the Ninth Judicial District Court for the Parish of Rapides, State of Louisiana, against the United Mine Workers of America, a labor organization, (R. 3), and James Ledbetter as an agent of said labor organization, and Richard Vidrine, Lewis Dunn, Foster Joseph, Leonard Fuller, David Fox, Henry Fowler, Will Sullivan, Mack Kelley, Eddie Goff, Will Cobb and John Doggins, plant employees of the respondent. Respondent alleged that these defendants (petitioners herein) had set up a picket line at the plant on March 1, 1954, which a number of the employees refused to cross, thereby curtailing the operation of respondent's plant.

Respondent pleaded the usual equity allegations and sought injunctive relief against the picket line based on the following numbered paragraphs of the petition which became the sources of the issues in this litigation:

8

"In the alternative, and should it be found that petitioner is engaged in a labor dispute with the defendant union, which is denied, then it would be unable to recognize it as bargaining agent of its employees because the National Labor Relations Board has refused to recognize said defendant

union as a qualified labor organization because of the failure of its officers to disavow communist affiliation, as required by the National Labor Relations Act; that picketing, peaceful or otherwise, by such noncomplying union, is an unlawful interference with petitioner's business." (R. 4)

"Petitioner shows that the picketing presently engaged in by the defendant union has for its unlawful purpose the forcing of petitioner to interfere with the rights of its employees, as expressed by the legislature of Louisiana, by requiring petitioner to deal with the defendant union as a representative of its employees in the absence of their selection of said union as their representative." (R. 4)

In their exception to the jurisdiction (R. 10), their return to the rule (R. 13), and their formal answer (R. 63), the petitioners (then defendants) pleaded, in brief, that the respondent had alleged an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board. In their return to the rule (R. 12 and 13) and formal answer (R. 63) petitioners set up that the United Mine Workers of America had been selected as a bargaining agent by 80% of the plant employees; that when the employer arbitrarily refused to negotiate with or recognize this bargaining agent a picket line was set up, and that this peaceful employee picket line was protected by the free speech provision of the First Amendment to the United States Constitution. (R. 13) (R. 64) and, finally, that this picketing was protected by the National Labor Relations Act enacted under the Commerce Clause of the United States Constitution and beyond state regulation or restraint (R. 64).

On March 2, 1954, the Trial Court issued a restraining order against all picketing (R. 7).

On the trial of this cause on March 12 and 15, 1954, on the rule for a temporary injunction, the pertinent, uncontradicted evidence shows the following:

The respondent, Arkansas Oak Flooring Company, had maintained for a number of years prior to 1954 an oak flooring manufacturing plant in Alexandria, Louisiana, (R. 25) where respondent employed two hundred and twenty-five mill or plant employees in addition to the normal clerical, supervisory and management staff (R. 36, 39). Approximately ninety percent of the finished product of this plant was sold out of the State of Louisiana (R. 42) and the respondent was admittedly in interstate commerce (R. 27).

There had been no union at the Alexandria plant within the four years prior to March 1, 1954 (R. 42).

During October or November, 1953, James L. Ledbetter, a representative of District 50 of the United Mine Workers of America, contacted the mill employees for the purpose of organization (R. 48). As a result a union was organized by the mill employees by their voluntary association about December, 1953 (R. 50).

By February 23, 1954, a total of 174 of the plant employees had signed membership applications with District 50, United Mine Workers of America, and had designated this union as its bargaining agent with the respondent (R. 51). (See copy of designation, D-1 at R. 15). On this date a meeting was held by the members of the union and James L. Ledbetter was

authorized, by unanimous resolution, to approach the employer and ask for recognition of District 50, United Mine Workers, as bargaining agent for the plant employees (R. 36).

On the next day, Wednesday, February 24, 1954, the president of the local union, Cornelius W. Brown, and Ledbetter went to the plant and there Mr. Ledbetter contacted Mr. George Fowler, who was in charge of the plant at that time (R. 59). Ledbetter identified himself to Mr. Fowler and showed his union credentials and stated that he represented the United Mine Workers and that the United Mine Workers represented a majority of the mill employees and he then made a formal demand for recognition of District 50 of the United Mine Workers as bargaining representative for these employees (R. 52, 21, 58). Mr. Fowler informed Mr. Ledbetter that his union "wasn't recognized by the National Labor Relations Board and that he didn't recognize us either." (R. 53).

Mr. Ledbetter reported this refusal of recognition to the union members on the same afternoon and the members voted to post a picket line at the plant on the following Monday, March 1, 1954 (R. 54).

On this date, the union members, including all individual employee defendants, set up a picket line at the plant. The picket line consisted of only three men. Two men carried signs on Texas Street near the main entrance to the plant and one picket was set up on a side street entrance (R. 29, 55).

The picketing at all times was on public property, i.e., the public streets (R. 29).

The picketing was peaceful (R. 55) and was only at the employer's plant (R. 29).

The signs were carried by employees of the plant, each a union member (R. 29).

Only two signs were carried by the pickets. One sign stated "This plant is on strike;" the other, "We want recognition, District 50 U.M.W." (R. 29). The picketing was for the purpose of obtaining recognition of District 50, United Mine Workers as the bargaining representative of the plant employees (R. 30).

The picketing continued peacefully until the late afternoon of Tuesday, March 2, 1954, when restraining orders were served on the defendants and the picketing ceased.

On the trial of this rule to show cause, in addition to the above evidence, union membership cards of 179 of the mill employees were offered and received in evidence (Defendant's Ex. D-1 and D-2, R. 15, 16 and 51, 59). See also, Stipulation, R. 17.

The respondent offered in evidence, without objection, a letter (Plaintiff's Ex. I, R. 34, 14) from the Regional Director, Fifteenth Region, National Labor Relations Board of New Orleans, Louisiana, which stated that

> "the United Mine Workers of America has not complied with the filing requirements of Sections 9 (f) (g) and (h) of the Act and therefore may not use the services of the Board for either representation or unfair labor practice matters."

On March 15, 1954, the Trial Judge issued a preliminary injunction, without reasons, against all defendants restraining them from "picketing on, near

or about the plaintiff's property or approaches thereto just off Texas Avenue in the City of Alexandria."

This judgment (R. 17), was signed on March 25, 1954, and an appeal was perfected to the Supreme Court of Louisiana (R. 18).

Hearing on the permanent injunction was had on June 24, 1954, and by stipulation of counsel all evidence offered on the exceptions and rule for a preliminary injunction was re-offered as the evidence on the hearing for a permanent injunction (R. 61). The Trial Judge on June 24, 1954, rendered a judgment decreeing a permanent injunction similar to that adjudged on the temporary injunction hearing (R. 65). On the same date an appeal was taken to the Supreme Court of Louisiana (R. 66).

After both appeals were docketed in the Supreme Court under No. 41797 and 41983 respectively, the appeals were consolidated by order of the Supreme Court of Louisiana for presentation and argument (R. 68).

On April 25, 1955, the Supreme Court of Louisiana rendered its decree, with reasons, affirming both judgments of the Trial Court (R. 69).

A rehearing was refused by the Supreme Court of Louisiana on May 31, 1955 (R. 101). Petition for certiorari to the Supreme Court of Louisiana was filed in this Court on July 12, 1955, and was granted on October 17, 1955. (R. 101).

The foregoing record is clear. No fact is in dispute and none is in doubt. The opinion of the Supreme Court of Louisiana leaves no doubt as to what the

Board. The decision of the Supreme Court of Louisiana limits both the right of the employees to the free choice of their representative and their right of self help through a strike protected by Section 13 of the Act.

Point Number II—The Right to Strike Is Protected by the Act

Our point number two is this: If the Act protects the employees' freedom of choice it follows that a strike and peaceful picketing to enforce recognition of the chosen representative is likewise protected by the Act.

The opinion of the Supreme Court of Louisiana contains a glaring non sequitur. The Court says of the chosen representative, "It is not only ineligible for certification, but cannot compel the employer to recognize it as the representative of its employees."

The authorities are almost unanimous in holding that representation is not dependent upon prior certification by the National Labor Relations Board.

The U. S. Court of Appeals for the First Circuit has given a clear statement of the law in *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 Fed. 2nd 131. In that case, the respondent contended that it was under no statutory duty to bargain with a non-complying union. The Court says:

> "The short answer is that Congress has not made compliance with the filing requirements of par. 9 (f), (g) and (h) a condition precedent to the obligation of an employer under par. 8 (a) (5) to bargain collectively with the chosen representative of the employees; such compliance is merely made a condition precedent to invoking the machinery of the Act for the investigation of a question concerning representation, or for the

issuance of a complaint charging the commission of unfair labor practices."

The United States Court of Appeals for the Second Circuit gave the same construction to the provisions of the Act in the case of *N.L.R.B.* v. *Pecheur Lozenge Co. Inc.*, 209 Fed. 2nd 393, 402, 2nd Cir. 1953. Their language is:

> "In these circumstances, while failure to file the non-communist affidavits required by Section 9 (h) and financial statement and other reports required by Section 9 (f) and (g), bars a union from access to the processes of the Board, it does not necessarily destroy the Union's status as bargaining representative for purposes of Section 8 (a) 5. West Texas Utilities Co. v. N.L.R.B., 87 U. S. App. D.C. 179, 184 F. 2nd 233, certiorari denied, 341 U. S. 939, 71 S. Ct. 999, 95 L. Ed. 1366; N. L. R. B. v. Tennessee Egg Co., 6 Cir., 201 F. 2d 370, reversing 199 F. 2d 95 on the authority of N.L.R.B. v. Dant, 344 U. S. 375, 73 S. Ct. 375; N.L.R.B. v. Reed and Prince Mfg. Co., 1 Cir., 205 F. 2d 131, 133. In the latter case, the Court held that 'Congress has not made compliance with the filing requirements of 9 (f) (g) and (h) a condition precedent to the obligation of an employer under 8 (a) (5) to bargain collectively with the chosen representative of the employees.'"

The Supreme Court of Wisconsin, in the case of *Faribault Daily News, Inc.*, v. *Int. Typo Union*, 53 N.W. (2) 36, 47, gave an interpretation of the Act directly contrary to that of the Louisiana Supreme Court. Witness the following:

> "Plaintiff contends that the union has not filed the non-communist affidavit required by the federal act, and therefore, not being accredited,

in any way the right to strike, or to affect the limitations or qualifications on that right.' 61 Stat. 151, 29 U.S.C. (Supp. III) Sec. 163.

"By Sec. 13, Congress has made it clear that Section 8 (b) (4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act. No such specific provision in Sec. 8 (b) (4) reaches the incident here. The material legislative history supports this view."

A paragraph footnote on page 674 reads as follows:

"No. 8—See also, 'the primary strike for recognition (without a Board certification) is not proscribed.' S. Rep. No. 105, 80th Cong., 1st Sess. (pt. 1) 22, and see H. R. Rep. No. 510, 80th Cong., 1st Sess. 43."

It is to be noted that the strike in the instant case was called by the individual employees of Arkansas Oak Flooring Company. The picketing which was enjoined was picketing solely by the employees of that company. If they had the right to choose a representative and had a right to strike protected by Section 13, surely they had the right peacefully to picket. From time immemorial, picketing has been an integral and inseparable part of a strike. A strike without a picket line would, in the vast majority of cases, be of little consequence. A secret strike is a futile strike.

Picketing is the most graphic appeal to public sentiment and public favor available to the laboring man.

Point Number III—Certification Is Not a Condition Precedent to Representation

An employer is entitled to an election and certification only when there is a bona fide doubt as to majority representation.

The opinion of the Supreme Court of Louisiana in holding that a non-complying union and its member employees could not legally picket for recognition of that majority selected union, was based upon the reasoning that since the union by non-compliance prevented the employer from having such union certified, the union could not get recognition by means of a peaceful picket line. The fallacy of the Court's reasoning is in assuming that the employer had a right to certification in this case.

If the petitioning union had been in compliance, the employer could not have gotten an election and certification in this case, as such is only ordered by the Labor Board when necessary to decide a bona fide question of majority representation. It is to be remembered that 174 of the 225 plant employees had joined the union, selected it as their bargaining agent and signed authorization cards. Patently, there was no bona fide question of majority representation.

The Act itself shows very clearly that representation elections will only be ordered when necessary to determine a representation question. Section 159 (c) (1) (B) states as follows:

> "Whenever a petition shall have been filed . . . (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative . . . ; the Board shall investigate such petition and if it has reasonable cause to believe

Court decided and the reasons for that decision. In speaking of the union representative, the Court says:

> "* * * it is not only ineligible for certification, but cannot compel the employer to recognize it as the representative of its employees. The plaintiff's refusal to recognize the Union was, therefore, not in violation of any obligation imposed by law, and the picketing in furtherance of this unlawful objective was the employment of economic pressure illegally for the purpose of causing the employer irreparable injury for which it has no adequate administrative or legal remedy —injurious conduct which the state has jurisdiction to relieve." (R. 80)

As to free speech guaranteed by the First Amendment, the Court says:

> "The final contention—that the restraint of the picketing in this case is an infringement of the freedom of speech guarantees of the Federal and state constitutions—is also untenable inasmuch as we have found as a fact that the picketing here engaged in is for an unlawful objective. * * *" (R. 82)
>
> * * * * *
>
> "Furthermore, the right to speak freely, as guaranteed by the constitution, is the right to speak for one's self or as the duly authorized agent of another." (R. 83).

SUMMARY OF ARGUMENT

I. The right of employees engaged in interstate commerce to bargain collectively through representatives of their own choosing is unqualifiedly guaranteed by Sections 1, 7 and 13 of the Act. Section 9 (f) (g) and (h) has no effect upon the freedoms of choice and of designation of the employees' representative. This

Section merely denies the processes of the Board to non-complying unions. These basic rights of employees which Congress has recognized and protected cannot be restricted and declared unlawful by the Supreme Court of Louisiana.

II. The right to strike is a form of self-help protected by Section 13. The employer has the duty to bargain with the majority-selected representative and Congress has nowhere proscribed a primary strike for recognition.

The Supreme Court of Louisiana was interpreting and construing the Federal Act alone and did not purport to be declaring Louisiana law.

III. In order to hold the strike unlawful, the Supreme Court of Louisiana reasoned that non-compliance prevented the employer from having the union certified and, therefore, prevented the union from getting recognition through the compulsion of a strike. The majority representation being undisputed and free of all doubt, there was no need of certification for the employer to satisfy himself as to the realities of the designation and selection.

IV. The element of free speech is inherent in peaceful picketing. The purpose being lawful under the Act and the picketing peaceful under any test, it was the equivalent of free speech and is protected by the First Amendment.

V. The provisions of Section 8 (b) (2) and 8 (a) (3) of the Act, working together, constitute an unfair labor practice, known as employer coercion. The petition for injunction charged employer coercion. That charge placed exclusive jurisdiction to determine the question in the National Labor Relations Board.

ARGUMENT

Point Number I—Freedom of Choice Both Unrestricted and Protected by the Act

For answer to question number one for review, our first point is this: the right of employees engaged in interstate commerce to bargain collectively through representatives of their own choosing is both unrestricted and protected by the Labor Management Relations Act of 1947, as amended. This right cannot be nullified, restricted or limited by a State statute nor by a State Court decision.

The questions in this case must, we believe, be decided first of all by a careful study of the Labor Management Relations Act of 1947, as amended (hereafter referred to as the Act).

The public policy of the United States is expressly declared in the closing paragraph of Section 1 of the Act to be:

> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 61 Stat. 136, 29 U.S.C. Section 151.

This public policy is made effective by the provisions of Section 7. The first part of that section, dealing with the right of employees, reads:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *." 61 Stat. 140, 29 U.S.C., Section 157.

We have been unable to find any phrase or clause in the Act which limits in any way the right of the employees to bargain collectively through representatives of their own choosing. Neither do we find any such limitation or restriction on the manner, method or mode of the "designation" by employees of their representatives for collective bargaining. The definitions in the Act imply an unlimited freedom of choice in both respects. Section 2 (4) reads:

> "The term 'representatives' includes any individual or labor organization."

The next subparagraph provides:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 61 Stat. 137, 29 U.S.C., Section 152 (5).

The freedom of choice conferred by Section 7 to effectuate the public policy declared in Section 1 is further strengthened by the language of Section 13, which reads:

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151, 29 U.S.C., Section 163.

There is no single phrase or clause in the Act which prevents employees engaged in interstate commerce from choosing as their representative for purposes of collective bargaining a union which has not complied with Section 9 (f) (g) and (h) of the Act. In the enumeration of the unfair labor practices so carefully delineated in the language of the Act, there is no statement that it would be an unfair labor practice for a union which had not complied with Section 9 (f) (g) and (h) to represent employees. There is no statement which would make it an unfair labor practice for an employer to recognize and negotiate with a labor union as the representative of his employees if that labor union had not complied with Section 9 (f) (g) and (h). No fine is imposed upon any union which has not complied with Section 9 (f) (g) and (h). No limitation upon the right of a union to represent employees arises from a failure to file in accordance with the provisions of Section 9 (f) (g) and (h).

The processes of the Board are denied to non-complying unions. No investigation of questions concerning representation shall be made at their instance and no complaint shall issue on their charge of an unfair labor practice.

The Act nowhere declares that it shall be unlawful for a union to fail to file the reports and affidavit required by Section 9 (f) (g) and (h). The Act

nowhere declares that a strike to enforce recognition of a union which has not complied would be a strike for an unlawful objective. The Supreme Court of Louisiana has, in effect limited and restricted the statutory right protected by the express provisions of the Act. So far as we have been able to find, no decision of this Court has ever held that a state, either by statute or decision, can limit or restrict a right either granted or protected by a federal statute enacted under the Commerce Clause of the United States Constitution.

If the employees have a free and untrammelled choice of their representative, that power of choice cannot be nullified by limiting their selection to a particular kind or class or character of union. The right of free selection implies the right of free acceptance of the appointment.

To paraphrase the language of this Court in *Hill* v. *Florida*, 325 U. S. 538, at 542, we might say: The freedom of choice which Congress has expressly protected contemplates two parties to the selection; the party making the choice and the person, union or agency chosen, and this freedom cannot be thus frustrated by state legislation (and we might add, by state decision):

The language of the Court in *Hill* v. *Florida*, supra, is as follows:

> "* * * The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice. * * * Congress attached no conditions whatsoever to their freedom of choice in this respect. Their

own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications.

"* * * To the extent that Sec. 4 limits a union's choice of such an 'agent' or bargaining representative, it substitutes Florida's judgment for the worker's judgment." (Page 541)

In the more recent case of *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 at 474-475, this Court said:

"The Court has ruled that a State may not prohibit the exercise of rights which the federal Acts protect. Thus, in Hill v. State of Florida ex rel. Watson, 325 U. S. 538, 65 S. Ct. 1373, 1375, 89 L. Ed. 1782, the State enjoined a labor union from functioning until it had complied with certain statutory requirements. The injunction was invalidated on the ground that the Wagner Act included a 'federally established right to collective bargaining' with which the injunction conflicted. International Union of United Auto, Aircraft and Agr. Implement Workers of America v. O'Brien, 339 U. S. 454, 70 S. Ct. 781, 94 L. Ed. 978, involved the strike-vote provisions of a state act which prohibited the calling of a strike until a specific statutory procedure had been followed. The state act was held to conflict not only with the procedure and other requirements of the Taft-Hartley strike provisions but also with the protection afforded by par. 7 of that Act. In Amalgamated Association of St. Elec. Ry. & Motor Coach Emp. of America v. Wisconsin Employment Relations Board, 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364, the state court issued an injunction under a statute which made it a misdemeanor to interrupt by strike any essential public utility services. It was held that the state statute was invalid in that it denied a right which

Congress had guaranteed under par. 7 of the Taft-Hartley Act—the right to strike peacefully to enforce union demands for wages, hours and working conditions."

In the case of *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383 at 389, this Court uses this language:

> "First. We have recently examined the extent to which Congress has regulated peaceful strikes for higher wages in industries affecting commerce. Automobile Workers v. O'Brien, 339 U. S. 454 (1950). We noted that Congress, in Sec. 7 of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947, expressly safeguarded for employees in such industries the 'right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection,' 'e.g., to strike.' We also listed the qualifications and regulations which Congress itself has imposed upon its guarantee of the right to strike, including requirements that notice be given prior to any strike upon termination of a contract, prohibitions on strikes for certain objectives declared unlawful by Congress, and special procedures for certain strikes which might create national emergencies. Upon review of these federal legislative provisions, we held, 339 U. S. at 457:
>
> > "'None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation.'" (Citing cases)

By its decision the Supreme Court of Louisiana has qualified Section 7 of the Act. This amounts to an amendment of an Act of Congress by the decision of a State Supreme Court. The Act merely denies to non-complying unions the use of the processes of the

has no authority to act. The Joint Conference Report of the Senate House Committees which reported on the Labor Management Relations Act of 1947 states: 'It is to be observed that the primary strike for recognition (without a Board certification) was not prohibited.' In Teller, Labor Disputes and Collective Bargaining (1950 Supp.), Sec. 398.94, the author states: 'A primary strike for recognition may be called by a union though it is not certified,' citing the Senate and House Conference Report above quoted.

"In *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 2nd Cir., 1940, 112 F(2) 756, 757, 6 L. R.R. Man. 746, 747, the Court said: 'The contention that bargaining was not mandatory until the Board had accredited Local 307 as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support. Under Section 7 of the Act the right exists whether the union has or has not been certified as the bargaining representative of the employees.'"

It seems to us that the decision of this Court in *National Labor Relations Board* v. *International Rice Milling Company, Inc.*, 341 U. S. 665, and the footnote thereto are of great help in arriving at a correct decision on the question of whether the strike was unlawful. Beginning at page 672 this Court says:

"That Congress did not seek, by 8 (b) (4), to interfere with the ordinary strike has been indicated recently by this Court. This is emphasized in Sec. 13 as follows:

> 'Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish

The opinion of the Supreme Court of Louisiana makes it clear that the Court was interpreting and construing the Labor Management Relations Act of 1947. No Louisiana Statute was involved in this connection. The Louisiana Court cites three opinions of this Court, namely: *Hughes* v. *Superior Court,* 339 U. S. 460; *Teamster's Union* v. *Hanke,* 339 U. S. 470; and *Building Service Employees International Union, Local #262 et al.* v. *Gazzam,* 339 U. S. 532. None of these cases either expressly or by implication confers upon a State, Legislature or Court, the power to override the expressed public policy of the United States and to destroy a right carefully protected by the language of a Federal Statute.

In the *Hughes* case this Court said:

> "Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."

The undisputed facts in the instant case show that the picketing was in a perfectly proper manner. The purpose which the picketing sought to effectuate was the recognition of a federally protected right to negotiate through representatives of the employees' own choosing. If the employees had a protected right to choose their own representative under the Federal Act there is no means by which the State of Louisiana could make a lawful objective under Federal tests unlawful under any sort of state test.

The same reasoning would put the opinions in the *Hanke* and *Gazzam* cases to one side.

> that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election . . ."

On this right to require an election, the United States Court of Appeals for the Ninth Circuit, in *National Labor Relations Board* v. *Trimfit of California, Inc.*, 211 F(2nd) 206 (at 209) (1954), stated:

> "Respondent contends that it had no duty to bargain until the union had established its majority status by a Board election. There is no absolute right vested in an employer to demand an election. *Iob* v. *Los Angeles Brewing Co.*, 9 Cir., 1950, 183 F(2nd) 398. If an employer in good faith doubts the union's majority, he may, without violating the Act, refuse to recognize the union until its claim is established by a Board election. A doubt professed by an employer as to the union's majority claim must be genuine. Otherwise the employer has a duty to bargain and may not insist upon an election. *Joy Silk Mills* v. *N.L.R.B.*, 1950, 87 U. S. App. D.C. 360, 185 F(2d) 732."

In *National Labor Relations Board* v. *Parma Water Lifter Co.*, 211 F(2d) 258 (at 261) (1954), we find this language:

> "Finally, it sems to be urged that a Union is entitled to recognition as bargaining representative only after a Board conducted representation election. It is well settled, however, that the designation may be made by other means, one of the most common of which is the signing of Union authorization cards."

On this same point, i.e., that the employer cannot require an election where the employees have selected their bargaining agent by a majority vote, the United States Court of Appeals for the Seventh Circuit in *National Labor Relations Board* v. *International Newspapers, Inc.*, 210 F(2d) 501 (1954) said:

> "Although the prize of recognition must not be employed coercively to influence the employees in making their decision, once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees. N.L.R.B. v. W. T. Grant Co., 9 Cir., 199 F. 2d 711, certiorari denied 344 U. S. 928, 73 S. Ct. 497, 97 L. Ed. 714; N.L.R.B. v. Gutmann & Co., 7 Cir., 121 F. 2d, 756; Stewart Warner Corp. v. N.L.R.B., 4 Cir., 194 F. 2d 207; N.L.R.B. v. Standard Steel Spring Co., 6 Cir., 180 F. 2d 942; N.L.R.B. v. Flotill Products, Inc., 9 Cir., 180 F. 2d 441.
>
> "Reiteration of what has been said in these cases would serve only to lengthen this memorandum unduly. The decisive question in any case is whether there has been an uninfluenced expression of majority will; it matters not how that will be expressed. Although the result of a secret election may well be the most convincing means of expression, the election medium is by no means exclusive. However expressed, an employer is bound by the employees' determination. In doing so, he should be free of charges of unfair labor practices absent substantial evidence indicative of bad faith."

The position of the National Labor Relations Board on the point that the employer does not have a right to demand an election when the bargaining agent has been selected by the employees is shown in *Beaver*

Machine & Tool Co., 97 N.L.R.B. 33, 34, in which the Labor Board stated as follows:

> "As we have frequently held, an employer who, in good faith, doubts the majority status of a union which demands recognition as the bargaining representative of his employees, may lawfully insist that the union prove its majority in a Board-conducted election. But if, in insisting upon an election, the employer is motivated not by a bona fide doubt as to the union's majority standing, but by a rejection of the collective bargaining principle or a desire to gain time in which to undermine the union, the demand for an election is no defense to a refusal-to-bargain charge, if the union in fact represented a majority of employees in an appropriate unit at the time of the refusal to bargain."

The following cases hold that where the employer, in good faith, has no doubt that a particular union actually represents the majority of the employees in a bargaining unit, his refusal to recognize that union and bargain in good faith with it and his insistence on a prior election is an unfair labor practice under the Act.

N.L.R.B. v. *Armco Drainage & Metal Products*, 220 F.(2d) 573, 6th Cir. 1955.

N.L.R.B. v. *Poultry Enterprises, Inc.*, 207 F.(2d) 522, 5th Cir. 1953.

N.L.R.B. v. *Jackson Press, Inc.*, 201 F.(2d) 541, 7th Cir. 1953.

Joy Silk Mills v. *N.L.R.B.*, 185 F.(2d) 732. Dist. Col. Cir. 1950, Certiorari denied 341 U. S. 914.

N.L.R.B. v. *Kobritz*, 193 F.(2d) 8(14), 1st Cir. 1951.

Iob v. *Los Angeles Brewing Co. Inc.*, 183 F.(2d) 398, 9th Cir. 1950.

N.L.R.B. v. *Clearfield Cheese Co. Inc.*, 213 F.(2d) 70, 3rd Cir. 1954.

When the employer refused to recognize their chosen agent, the employees had a right to strike and set up a picket line in order to obtain recognition. The picket line was put up not only for a lawful purpose but for a protected purpose.

Point Number IV—Picketing Is Still Protected by the Free Speech Provision of the First Amendment

This Court has put picketing under the Free Speech Amendment of the United States Constitution in the following cases:

Senn v. *Tile Layers Protective Union*, 301 U. S. 468.

Thornhill v. *Alabama*, 310 U. S. 88.

Carlson v. *People of State of California*, 310 U. S. 106.

American Federation of Labor v. *Swing*, 312 U. S. 321.

Bakery and Pastry Drivers, et al. v. *Wohl*, 315 U. S. 769.

Cafeteria Employees Union, Local 302 et al. v. *Angelos*, 320 U. S. 293.

We realize, of course, that subsequent decisions of this Court have demonstrated that picketing is not always the equivalent of free speech. We submit, however, that no opinion of this Court has held that picketing of the kind and for the purpose shown by the undisputed evidence in this case would not be

protected as the equivalent of free speech. If the picketing enjoined by the Louisiana Court is the equivalent of free speech it is beyond the reach of that Court under the Fourteenth Amendment.

Point Number V—The Petition for Injunction Charged an Unfair Labor Practice

Paragraph 10 of the Petition for an Injunction reads:

> "Petitioner shows that the picketing presently engaged in by the defendant union has for its unlawful purpose the forcing of petitioner to interfere with the rights of its employees as expressed by the legislature of Louisiana, by requiring petitioner to deal with the defendant union as a representative of its employees in the absence of their selection of said union as their representative." (R. 4)

The quoted paragraph charges the unfair labor practice of employer coercion. The same sort of unfair labor practice to wit, employer coercion, came before this court in *Garner* v. *Teamsters Union*, 346 U. S. 485. The inability of a State Court to adjudicate such a charge is clearly set forth in the recent case of *Weber* v. *Anheuser-Busch, Inc., supra,* at page 475:

> "A State may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes. Such was the holding in the *Garner* case, *supra.* The Court pointed out that exclusive primary jurisdiction to pass on the union's picketing is delegated by the Taft-Hartley Act to the National Labor Relations Board. See also *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953; *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933. And in

Capital Service, Inc. v. *Labor Board*, 347 U. S. 501, a picket line established at retail stores to induce the organization of a manufacturer's employees was enjoined by the State as contrary to its public policy. This Court granted a limited certiorari which assumed that exclusive jurisdiction over the subject matter was in the National Labor Relations Board. The Board was allowed to obtain an injunction against enforcement of the conflicting state court injunction."

The failure of the employer to prove the allegations of paragraph 10 of its petition is of no importance. The jurisdictional question is necessarily determined by the allegations in the pleading. For example, if a man filed a libel against a ship in a State Court, that Court would have no jurisdiction although the undisputed evidence at the trial showed the man was injured on land. In the same manner, if he filed a bill in equity in a law court, that court would be without jurisdiction. The pleading is but the password and countersign with which the litigant obtains entry into the proper forum. Here the controversy presented by the petition prevents state jurisdiction. See *Garner* v. *Teamster's Union, supra.*

The proper procedure for the State Court is set up in this language of the *Weber* decision:

"But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." (Page 481).

Point Number VI—The Position of the Labor Board

The present attitude of the Labor Board will be presented to this Court in a brief by the Solicitor General of the United States. The attitude of the Board was expressed on October 10, 1955, in a case in which an affiliate of this Petitioner Union was involved, entitled *David G. Leach and Doyle H. Wallace, d/b/a Brookville Glove Company and Westie K. Shick, et als.*, Case No. 6-CA-770 in manuscript, 114 N.L.R.B. #52. The following is the statement of the Board's position at that time:

> "The Respondents contend, however, that the strike was illegal and that the strikers are not entitled to the protection of the Act because they participated in a strike whose objective was recognition of a labor organization not in compliance with Section 9 (h) of the Act.
>
> "We find no merit in this contention. There is no precedent in support of the Respondents' position.[1] On the contrary, in Rubin Bros., 99 N.L.R.B. 610, 619, the Board rejected a contention similar to that now urged by the Respondents. The Act does not proscribe bargaining with a non-complying union; indeed, consonant with public policy, an employer may voluntarily recognize and deal with such a union.[2] If Congress had intended the Act to have the effect urged by the Respondents, it easily could have inserted an express provision in the statute to accomplish such result. This, Congress did not do. While the union in this case could not use the processes of this Board to obtain recognition as bargaining representative in view of its failure to comply with Section 9 (h) of the Act, we are not persuaded that Congress intended to withhold protection of the Act against discrimination from employees simply because they engaged in acts of self-help, otherwise

legitimate, as members or adherents of a non-complying labor organization.[3] Hence we conclude that the strike in this case was a protected concerted activity.'"[4]

CONCLUSION

WHEREFORE, we respectfully pray that each of the questions presented for review be answered by this Court in the affirmative and the judgment of the Supreme Court of Louisiana be reversed and vacated and that the injunctions be dissolved and the suit dismissed accordingly.

Respectfully submitted,

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Proof of Service

I hereby certify that I have deposited in the United States Post Office in Washington, D. C., with sufficient air mail postage thereon to insure delivery, copies of the foregoing Brief and Argument and annexed appendix, addressed to all Counsel for Arkansas Oak Flooring Company, Respondent, one copy being addressed to the Hon. Grove Stafford to his office in the Guaranty Bank Building, Alexandria, Louisiana; one copy to the Hon. John Pitts, to his office in the Guaranty Bank Building at Alexandria, Louisiana; and one copy to the Hon. Richard C. Keenan, to his office in the Whitney Building, New Orleans, Louisiana, on this the ..... day of December, 1955.

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I further certify that I have placed in the United States mail at the United States Post Office at Washington, D. C., three (3) copies of the foregoing Brief and Argument and annexed appendix addressed to the Solicitor General, Department of Justice, Washington, 25, D. C., with postage thereon fully prepaid to insure delivery, on this the ..... day of December, 1955.

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APPENDIX

Constitutional Provisions and Statutes

United States Constitution, Amendment I, U.S.C.A.:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1, U.S.C.A. (Excerpt):

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Article I, Section 8:

Clause 1.

The Congress shall have Power * * *

Clause 3.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Labor Management Relations Act of 1947

Section 1, Last Paragraph:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining

and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. 61 Stat. 136, 29 U.S.C., Section 151.

Section 2 (4) (5):

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. 61 Stat. 137, 29 U.S.C., Section 152 (4) (5).

Section 7:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158 (a) (3) of this title. 61 Stat. 140, 29 U.S.C., Section 157.

Section 8 (a) (3) (Excerpt):

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. * * *. 61 Stat. 140, 65 Stat. 601, 29 U.S.C., Section 158 (a) (3).

Section 8 (a) (5):

(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title. 61 Stat. 140, 65 Stat. 601, 29 U.S.C., Section 158 (a) (5).

Section 8 (b) (2):

(b) It shall be an unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. 61 Stat. 140; 65 Stat. 601, 29 U.S.C., Section 158 (b) (2).

Section 9 (f), (g) and (h):

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000.00 and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor. 61 Stat. 143, 65 Stat. 601, 29 U.S.C., Section 159 (f).

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members

annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 160 of this title with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection. 61 Stat. 143, 65 Stat. 601, 29 U.S.C., Section 159 (g).

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of title 18 shall be applicable in respect to such affidavits. 61 Stat. 143, 65 Stat. 601, 29 U.S.C. 159 (h).

Section 13:

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. 61 Stat. 151, 29 U.S.C., Section 163.

Jurisdictional Statute

Title 28, United States Code, Section 1257 (3), reads in part as follows:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * or statutes of * * * the United States.